STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B103

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION

TERI KAY BRIDGES,

Complainant,

v.

DEPARTMENT OF TRANSPORTATION and DEPARTMENT OF PERSONNEL AND ADMINISTRATION,

Respondents.

This matter is before the undersigned Administrative Law Judge on Respondent Department of Personnel and Administration's Motion for Summary Judgment, which was joined by the Department of Transportation on December 10, 2001, and on Respondent Department of Transportation's Motion for Reconsideration of its Motion to Dismiss filed on January 14, 2002.[1] The Administrative Law Judge, having reviewed the pleadings, file and relevant case law hereby grants Respondents' motion for summary judgment for the reasons that follow.

PROCEDURAL HISTORY

Complainant Teri Kay Bridges, an Equipment Mechanic III employed by the Colorado Department of Transportation ("CDOT") filed this appeal on April 5, 2001,

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[1] The Administrative Law Judge has treated the Department of Transportation's motion for reconsideration of its motion to dismiss as a supplemental pleading to the motion for summary judgment. The issues raised in its motion to dismiss are the same as those raised in Respondents' joint motion for summary judgment. And Respondent Department of Transportation attached deposition testimony and other evidence to its motion, in effect, converting it to a motion for summary judgment.

Respondent Department of Personnel and Administration ("DPA") also filed a Motion to Reconsider the ALJ's orders denying CDOT's Motion to Dismiss and granting Complainant's Motion to Join the Department of Personnel as a Party on August 23, 2001. Those same issues are addressed herein. CDOT's motion to dismiss is granted consistent with this opinion, and the DPA's challenge to its joinder in this action is denied for the reasons set forth below.

alleging that she was denied a five percent pay increase pursuant to a labor trades and craft study, which was part of a system maintenance study known as JEL 99-8 and JEL 00-2.[2] On April 27, 2001, CDOT filed a motion to dismiss on jurisdictional grounds, which was denied by Administrative Law Judge Kristin F. Rozansky on May 15, 2001. On May 31, 2001, CDOT filed a Motion to Dismiss for Failure to Join an Indispensable Party, or, in the Alternative, Request for Order to Show Cause, arguing that the Department of Personnel/General Support Services (now renamed the Department of Personnel and Administration ("DPA"))[3] is the agency solely responsible for conducting and administering the labor trades and craft study at issue. Administrative Law Judge Rozansky denied CDOT's motion on June 20, 2001. However, on June 29, 2001, Complainant filed a Motion to Join the Department of Personnel and Administration as a party. On July 24, 2001, Administrative Law Judge Rozansky granted Complainant's motion to join the DPA as an indispensable party.

On August 6, 2001, the DPA filed a Request for Clarification of Order complaining that Administrative Law Judge Rozansky had expected the DPA to respond to Complainant's joinder motion when the DPA was not yet a party to the case. The DPA also sought guidance as to the timetable for the DPA's exercise of its due process rights. On August 9, 2001, Administrative Law Judge Rozansky issued an order responding to the DPA's request for clarification, setting forth various scheduling dates for discovery and motions and providing guidance with respect to the issues raised by the DPA. Administrative Law Judge Rozansky attached a copy of Complainant's appeal and her previous prehearing order, and she ordered Complainant and CDOT to provide the DPA with all pleadings in the case in a timely manner.[4]

The DPA filed a Motion to Reconsider the orders denying CDOT's motion to dismiss and granting Complainant's motion to join on August 23, 2001, and on September 18, 2001, the DPA filed an Objection to the Continuing Violation of DOP's Rights and the Rulings During the September 12, 2001 Hearing.[5] On October 9, 2001,

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[2] System Maintenance Study JEL 99-8/JEL 00-2 is referred to interchangeably as "system maintenance study" or the "labor trades and craft study."

[3] The Department of Personnel and Administration is referred to interchangeably as DOP or the DPA.

[4] The only issue not addressed by Administrative Law Judge Rozansky concerned her citing the DPA's failure to respond to Complainant's motion to join the DPA as an indispensable party. Given that the issue has been reconsidered and decided in this opinion, there is no need to further address the DPA's request for clarification.

[5] Many of the DPA's complaints in this pleading are related to its position that the Personnel Board has no jurisdiction to hear Complainant's appeal and that her appeal has no merit. The other complaints concern the DPA's perception that deadlines being applied to it were not being applied equally to Complainant. In its pleading, the DPA objected to all of the deadlines and hearing date set by Administrative Law Judge Rozansky. Most, if not all, of the DPA's objections to the deadlines and hearing date set by Administrative Law Judge Rozansky are moot. The hearing date was vacated and reset when the case was reassigned to the undersigned Administrative Law Judge, and the deadlines

the DPA filed a Motion for Summary Judgment, which was joined by CDOT on December 10, 2001.

On October 16, 2001, Administrative Law Judge Kristin Rozansky recused herself from the case. In late November 2001, Sunhee Juhon, a contract administrative law judge, was assigned to the case, and she set a prehearing/status conference for December 10, 2001. The evidentiary hearing was set for February 4-5, 2002. Complainant filed her Response to Motion for Summary Judgment on November 30, 2001, and Respondents filed their Joint Reply Brief on December 28, 2001. Oral argument on the motion for summary judgment was heard on January 11, 2002, before the undersigned Administrative Law Judge. At oral argument, the parties supplemented the record with cites to Complainant's deposition. In addition, Complainant was given leave to submit additional deposition cites and a signed signature page on or before January 18, 2002. In light of the pendency of Respondents' motion for summary judgment, the Administrative Law Judge vacated the February 4-5, evidentiary hearing. Complainant did not submit additional deposition cites, but submitted the signed deposition on February 1, 2002, at which time the motion for summary judgment became ready for decision.

PRELIMINARY MATTERS

Both CDOT and the DPA maintain in their various motions that neither is a proper party to this action. Before proceeding further, this issue must be resolved.

A. CDOT Is a Proper Party.

At the December 10, 2001, status conference, CDOT asserted that it is not a proper party to this action because it had no decision-making authority over the system maintenance study at issue or over Complainant's base pay as it related to the change in pay grade pursuant to the system maintenance study. It also relies heavily on its argument that the Complainant's claim has no merit and should be dismissed.

Since CDOT funds Complainant's salary and, hence, any increase that might be awarded to her under the system maintenance study, and has an admitted interest in the outcome of this case, CDOT is a proper named Respondent. Most, if not all, respondents would seek to avoid the costs and inconvenience of litigation by arguing that a complainant's claims are entirely without merit or that there is a lack of jurisdiction

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have all passed or were modified in light of the new hearing date set for February 4-5, 2002. Accordingly, the DPA's objection is overruled, and the Administrative Law Judge concludes that the DPA's due process rights have not been violated.

to hear the claims and so be excused from the litigation. That is not a compelling or legally sufficient reason to dismiss a party.

B. DPA Is a Proper Party.

The DPA concedes that it has an interest in the outcome of this case, and that if Complainant were to prevail, it is the agency that could provide her relief. Its primary objection to being joined as a party is that Complainant's claim is without merit. And it objects to the manner in which it was added as respondent. The DPA contends that the issue raised by Complainant is not appealable to the Board; the appeal is untimely; and the appeal fails to contain allegations against the DPA. In addition, the DPA raises numerous due process violations, including insufficient time to prepare its case.

Rule 19(a) of the Colorado Rules of Civil Procedure provides:

> A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Drawing upon the standards of Rule 19, the Administrative Law Judge concludes that the DPA is a necessary party to this administrative proceeding.[6] "Only if 'an absent person's interest in the subject matter of the litigation is such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person' is the absent person considered indispensable." *Brody v. Brock*, 897 P.2d 769, 778 (Colo. 1995) (quoting *Ford v.Adkins*, 39 F. Supp. 472, 473 (E.D. Ill. 1941)). If Complainant were to prevail and the Administrative Law Judge ruled that the system maintenance study at issue provided for a salary increase or that the study was unconstitutional as it was applied to

[6] "Because . . . the General Assembly specifically has addressed the question of joinder in section 24-4-106 (C.R.S), (C.R.C.P.) Rule 19 is not applicable in [judicial] proceedings brought under the state Administrative Procedure Act." *West-Brandt Foundation, Inc. v. Carper, Colo.*, 608 P.2d 339, 341 n.5 (1980). "Whether a person or organization meets the statutory requirement as a mandatory party in an action for judicial review depends on whether it 'should have been included in the administrative proceeding.'" *Id.*

Complainant, the DPA's interest would be significantly affected. Moreover, CDOT could not provide the relief Complainant is seeking if she were to prevail.

Under these circumstances, the Administrative Law Judge concludes that the DPA is an indispensable party and was properly joined as a Respondent to this action. The DPA's joinder may not have occurred under ideal circumstances; nevertheless, the DPA's rights have not been violated. Indeed, at the December 10, 2001, status conference the Administrative Law Judge tried to ensure that the DPA, in particular, had adequate time to prepare its case.

FINDINGS OF FACT

The following findings of fact are based on the parties' stipulated facts, admissions made pursuant to discovery requests, and on Complainant's deposition testimony. Only undisputed facts appear below.

1. On May 24, 1999, in accordance with Personnel Board Rule 1-8 and Personnel Director's Procedure P-2-3, the DPA notified directly affected employees of the labor, trades and crafts occupational group of proposed changes as part of a system maintenance study, JEL 99-8, a/k/a labor trades craft study ("LTC study"). One of the proposed changes included a change in position name and pay grade for Heavy Equipment Mechanic. The name would be changed to Equipment Mechanic III, and the pay grade would change from D42 to D44.

2. Phase I of the system maintenance study was implemented on July 1, 1999, and Phase II of the LTC study, referred to as JEL 00-2, was implemented by the DPA on July 1, 2000.

3. Complainant began working as a state employee with the Colorado Department of Transportation in the position of Heavy Equipment Mechanic, pay grade D42, on August 2, 1999. Her initial salary was $2,416 per month.

4. At that time, for fiscal year 1999-2000, the state pay range for Heavy Equipment Mechanic was $2,301 to $3,336 per month.

5. CDOT's minimum hiring rate for the class of Heavy Equipment Mechanic for fiscal year 1999-2000 was $2,416 per month.

6. On February 1, 2000, all affected employees were notified of the final approval of JEL 00-2.

7. When JEL 00-2 was implemented on July 1, 2000, the study provided that Heavy Equipment Mechanic, pay grade D42, would be changed to Equipment Mechanic III, pay grade D44.

8. As a result of system maintenance study JEL 00-2, on July 1, 2000, Complainant's classification changed from Heavy Equipment Mechanic to Equipment Mechanic III. Her pay grade was adjusted from D42 to D44. Her pay range changed from $2,301-$3,336 per month to $2,415-$3,503 per month.[7]

9. After the system maintenance study was implemented, Complainant's pay rate ($2,416 per month) was above the minimum of her new pay grade D44 ($2,415 per month).

10. According to an affidavit by David Fowler, an Occupation Specialist employed by the DPA, the system maintenance study did not provide for a salary increase for any employee affected by the change from Heavy Equipment Mechanic to Equipment Mechanic III, unless that employee's pay was below the minimum base salary rate of pay grade D44 ($2,415 per month).

11. On July 1, 2000, Complainant received a 3.7% increase in salary as a result of the 2000 Total Compensation Survey. Her salary increased from $2,416 to $2,505 per month. The state pay range for Equipment Mechanic III after the salary survey was implemented was raised to $2,504 to $3,633 per month. After the salary survey was implemented, Complainant's pay rate was still above the minimum for pay grade D44.

12. Complainant's anniversary date was set at August 1, 2000.

13. On August 1, 2000, Complainant received a 5% anniversary pay increase in salary to $2,630 per month.

14. Complainant was certified in the position of Equipment Mechanic III on August 2, 2000.

15. In the latter half of the year 2000, after the system maintenance study was implemented, Mark Berry, a CDOT employee in the Equipment Mechanic III position, received an anniversary increase that he would not have otherwise been entitled to receive if his pay grade had not been raised under the system maintenance study.

16. Complainant is not seeking pay pursuant to CDOT's discretionary pay differential policy.

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[7] P-12-20 defines "pay grade" as "[a] number used to identify a pay range assigned to a class. If reflects the minimum and maximum base salary rates for work in a specific class. Individual salaries vary within the ranges depending on individual movements in accordance with these provisions."

P-12-22 defines "pay rate" as "[a]ctual base pay amount within a pay grade."

17. James Peaslee, a Senior Employee Representative with the Colorado Association of Public Employees, posed inquiries to CDOT representatives on behalf of Complainant regarding changes to her salary in the year 2000. On March 28, 2001, Peaslee was told that no adjustment was made to Complainant's base salary as a result of the system maintenance study.

18. On April 5, 2001, Complainant filed an appeal to the State Personnel Board alleging that she had been denied a five percent salary increase pursuant to a labor trades and craft study. In her appeal, she claims that she was moved up two pay classes but received no monetary compensation. According to her, the increase was effective July 1, 2000, and was to be awarded on her anniversary date.

DISCUSSION

A. Standards for Summary Judgment in Administrative Proceedings.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992); *David v. City and County of Denver*, 101 F.3d 1344 (10th Cir. 1996), *cert. denied*, 522 U.S. 858 (1997). The moving party bears the initial burden of showing the absence of any disputed issue of material fact; the burden then shifts to the non-moving party to establish that a triable issue of fact exists. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991). A genuine issue of disputed fact cannot be raised by counsel simply by way of argument. *Sullivan v. Davis*, 474 P.2d 218 (Colo. 1970). The non-moving party must counter the moving party's statements of fact by affidavit or other evidence demonstrating the existence of a triable issue of fact. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993). An affirmative showing of specific facts, uncontradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 991 (Colo. 1968). The non-moving party is entitled to all favorable inferences that may be drawn from the evidence, and all doubts must be resolved against the moving party. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992).

B. Statement of the Issue.

The sole issue in this case is whether system maintenance study JEL 99-8/00-2 provided for a salary increase when it changed the classification of Heavy Equipment Mechanics to Equipment Mechanics III and also increased the pay grade of the position from D42 to D44.

Complainant filed a direct appeal with the Personnel Board against CDOT on April 5, 2001. She claims that she is entitled to a 5% salary increase under system maintenance study JEL 00-2. Complainant reasons that when her pay grade increased

two levels from D42 to D44, each level necessarily represented a 2.5% salary increase. In other words, a five percent salary increase was inherent in the two-step pay grade increase she received. Although Complainant admits that there is no explicit language in the system maintenance study, itself, that provides for such a raise in salary in addition to or as a part of the pay grade increase, she maintains that without it the system maintenance study is unconstitutional.

Complainant's protean claim takes on two basic forms: According to one theory of her case, other equipment mechanics directly received a salary increase under the study which happened to be paid on their anniversary dates; according to her alternative theory, more senior equipment mechanics indirectly received a salary increase under the study in the form of an anniversary increase that they would not have been eligible to receive but for the system maintenance study. Under this latter theory, Complainant maintains that she was adversely affected by the system maintenance study and was denied her right to equal protection under the fourteenth amendment.

C. The Personnel Board Has Jurisdiction Over Complainant's Appeal.

Respondents have vehemently maintained from the outset that the Personnel Board does not have jurisdiction over Complainant's appeal.

Section 24-50-125(5), C.R.S. (2001) provides that "the board shall hold a hearing within forty-five days of the appeal, upon request of the employee or employee's representative, for any certified employee in the state personnel system who protests any action taken which adversely affects the employee's current base pay as defined by board rule, status, or tenure." Personnel Board Rules permit a direct appeal to the Personnel Board as a matter of right for "[a]ny action that adversely affects current base pay, status or tenure (except annual total compensation survey, discretionary pay differentials, leave sharing, personal services contracts, and job evaluation system and actions) . . .. R-8-52, 4 CCR 801.

Respondents argue that Complainant has failed to allege any action on the part of the DPA that has adversely affected her base pay, status or tenure. They also contend that Complainant has in effect mounted a challenge to the system maintenance study, and such appeals are specifically excepted by Personnel Board Rule R-8-52. Personnel Board Rule P-2-2, 4 CCR 801, also establishes that the changes concerning classes and pay grade assignments are not appealable:

> System maintenance studies create, amend, or abolish classes and/or include pay grade assignments. A study may include the review of all affected positions for placement in the proper new class. No allocation or appointment may be made to a proposed class until it is approved as final on a date

> determined by the director. The results are not appealable but are subject to 'meet and confer' if requested.

In addition, the DPA cites Section 24-50-104(6)(B)(II), C.R.S. (2001), which provides that employees may submit appeals to the state personnel director if the system maintenance study results in an employee's allocation to a lower pay grade. If, as in Complainant's case, the system maintenance study leads to the employee's allocation to a higher pay grade, no appeal is available.

Complainant does not dispute that direct appeals to job evaluation systems or to system maintenance studies are prohibited.[8] However, she counter argues that she is not challenging the system maintenance study itself. She is satisfied with the two-level pay grade increase she received. Instead, she is challenging the implementation of the study and its alleged adverse impact on her compared to similarly situated workers.

Thus, the first issue that needs to be addressed is whether Personnel Board Rule R-8-52 prohibits Complainant's appeal. According to Complainant's theory of her case, which the Administrative Law Judge accepts for the purpose of deciding this jurisdictional issue, the DPA did take an action—by allegedly denying her a 5% salary increase pursuant to the system maintenance study—that had an adverse impact on her base salary. And, she is not challenging the study, itself, only its implementation. She is complaining that her right to receive the full benefit of the system maintenance study was denied.[9] Thus, the Administrative Law Judge concludes that the Personnel Board has jurisdiction to hear her appeal.

D. Complainant's Appeal Was Timely.

A corollary issue to the jurisdictional one is whether Complainant's appeal is timely.

Section 24-50-125.4, C.R.S. (2001) provides in pertinent part:

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[8] The DPA posits and the Administrative Law Judge agrees that while there is a technical difference between a "job evaluation system " and a "system maintenance study," they are sufficiently related, if not synonymous, for the purpose of R-8-52. Personnel Board Rule P-12-16 defines "job evaluation system" as a "[s]ystem of classes and class descriptions developed by the director. All positions are placed in the system during a system maintenance study or are allocated when an assignment changes or a position is created." Personnel Board Rule P-12-29 defines "system maintenance study" as "[t]he process used to determine classes and/or pay grades and to properly place all affected positions into new classes. It includes class placement."

[9] At oral argument, counsel for the DPA conceded that if the study had provided for a 5% salary increase and Complainant did not receive that increase, the Personnel Board would have jurisdiction to hear her appeal.

> Except for discrimination appeals which may also be filed with the Colorado civil rights division in the department of regulatory agencies, all appeals from actions of the state personnel director, appointing authorities and agencies which are specifically appealable to the board under the state constitution or this article shall be filed with the board within ten days of receipt of notice of such action. All such appeals shall allege with particularity the specific acts being appealed and the reasons for the appeal.

The timeliness of Complainant's appeal turns on when she received "notice" of such action and what "such action" is defined as. Respondents maintain that the critical date is the date Complainant was notified of the system maintenance study on February 1, 2000, or when it was implemented on July 1, 2000, making her appeal almost a year late. Respondents also rely on their jurisdictional argument that the system maintenance study cannot be appealed and the study did not provide for any salary increase, so no action was taken that adversely affected her base salary.

Complainant counters that the adverse action was not the date the study was implemented, but the date she was denied a 5% salary increase under the study. According to Complainant, she did not officially learn that she would not receive an increase to her base salary pursuant to the system maintenance study until March 28, 2001, when a representative on her behalf contacted two CDOT representatives. She also contends that the DPA neglected to advise of her appeal rights, which sets the clock running as to when she must appeal.

It is undisputed that Complainant did not receive any notice of her right to appeal. Although Respondents maintain that there was good reason for not providing notice, *i.e.*, the alleged lack of jurisdiction for her appeal, the Administrative Law Judge concludes that Complainant was entitled to notice. Her challenge to how the system maintenance study affected her base pay is an issue subject to appeal for the reasons discussed above. Since she did not receive any notice of her appeal rights and the relevant deadlines for her appeal, her appeal is not untimely. *See Renteris v. Colorado State Dept. of* Personnel, 811 P.2d 797, 802-03 (Colo. 1991) ("employee's time to appeal does not run if the notice did not properly advise the employee of his or her right to appeal"); *Salas v. State Personnel Board of the State of Colorado*, 775 P.2d 57, 60 (Colo. App. 1989), *cert. denied*, (June 19, 1989); *Cunningham v. Dept. of Highways*, 823 P.2d 1377, 1380 (Colo. App. 1991), *cert. denied*, (Jan. 27, 1992).[10]

[10] To the extent Respondents argue that Complainant was aware of CDOT's denial of her request for a salary increase under the system maintenance study much earlier than her April 5, 2001, filing date, the Administrative Law Judge concludes that the timeliness of Complainant's appeal is then a disputed issue not appropriate for summary judgment. There was no uncontroverted evidence as to the exact date that Complainant learned she would not receive a salary increase under the system maintenance study. Potential dates include the date the study was implemented on July 1, 2000; to her anniversary date on August 1, 2000, when she did not receive an increase under the study; to the various anniversary dates

E. Complainant Was Not Denied a Five Per Cent Salary Increase Pursuant to System Maintenance Study JEL 00-2.

Personnel Board Rule P-12-29, 4 CCR 801, defines "system maintenance study" as "[t]he process used to determine classes and/or pay grades and to properly place all affected positions into new classes. It includes class placement." And Personnel Board Rule P-2-2, 4 CCR 801, states that "System maintenance studies create, amend, or abolish classes and/or include pay grade assignments. A study may include the review of all affected positions for placement in the proper new class. No allocation or appointment may be made to a proposed class until it is approved as final on a date determined by the director. The results are not appealable but are subject to 'meet and confer' if requested."

The effect of System Maintenance Study JEL 00-2, as it affected Complainant, was to rename the title of her position—from Heavy Equipment Mechanic to Equipment Mechanic III—and to change her pay grade two levels from D42 to D44. Complainant concedes there is no language in the system maintenance study, itself, that provides for a salary increase. Indeed, Donald Fowler, an Occupational Specialist employed by the DPA, submitted an affidavit attesting to the fact that the system maintenance study did not provide for a salary increase to any employee affected by the change from Heavy Equipment Mechanic to Equipment Mechanic, unless that employee's pay was below the minimum of pay grade D44 ($2,415 per month). Complainant's base salary was $2,416, so she was ineligible for any salary increase.

The fact that Complainant's base salary did not change as a result of the study is consistent with Personnel Board Rule P-3-13, 4 CCR 801, which provides that "In the case of system maintenance studies, employees' base pay shall remain the same. If the director finds that severe and immediate recruitment and retention problems make it imperative to increase pay to maintain critical services, the director may order that base pay be increased up to the percentage increase for the new class."

Thus, under only two circumstances will an employee's base salary be increased pursuant to a system maintenance study that only provides for an increase in pay grade: 1) if the employee's salary was below the minimum of the new, increased pay grade or 2) if the personnel director determines a need for a pay increase. None of those two circumstances applies to Complainant.

Indeed, Complainant has failed to offer any evidence that she is entitled to a pay increase under the system maintenance study. Nor has she offered any compelling legal arguments to further her cause. She merely argues that because the system maintenance study provides for a two-level pay grade increase, she is entitled to a

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of other equipment mechanics who received anniversary increases; to several dates in the fall of 2000 when Complainant spoke with CDOT human resource personnel; to March 28, 2001.

commensurate salary increase. Although the Board definition of a system maintenance study, the system maintenance study, itself , and Board Rule P-3-13 clearly contradict such an inference, Complainant maintains that the Colorado constitution provides otherwise. She relies on Article XII, Section 13, subsection 8, which states that "[p]ersons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age. They shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties."

Complainant emphasizes that the constitution provides that employees shall be "graded and compensated." She construes this language to mean that if her grade is increased but her compensation is not, then her constitutional rights have been violated. Such an out-of-context reading of the constitution would lead to the result that every system maintenance study that provides for a pay grade increase would mandate a salary increase. The constitution does not provide for such an outcome. Furthermore, a change in classification or grade does not necessitate a concurrent change in salary. *C.f. Vivian v. Bloom*, 177 P.2d 541, 544 (Colo. 1947) (the power to classify positions does not necessarily implicate the power to fix compensation). There is nothing to indicate that Complainant was graded and compensated according to different standards of efficient service than her fellow equipment mechanics.

Complainant also argues that the Director of Personnel has the statutory responsibility of setting a prevailing pay grade and then is to implement a prevailing salary under Section 24-50-104. What Complainant fails to recognize is that increasing a pay grade is in effect increasing salary, as the pay range increases with each grade level increase. Thus, increasing a pay grade to a prevailing one has the effect of raising salary to a prevailing wage.

To the extent Complainant is arguing that the applicable Personnel Board Rules are in conflict with the constitution or statute, this argument fails. "An agency's construction of its own governing statute is entitled to great weight, and any rule that a state agency adopts pursuant to a statutory rulemaking proceeding is presumed valid." *Colorado Association of Public Employees v. Colorado Dept. of Personnel*, 991 P.2d 827, 829-30 (Colo. App. 1999). Only those actions by the department that are in excess of its statutory authority or are otherwise contrary to law may be set aside. *Id.* The Board rules concerning system maintenance studies are not in conflict with the constitution. And, Complainant has presented no evidence or arguments that would rebut the presumed validity of the Personnel Board's rules concerning system maintenance studies.

F. Complainant Was Not Adversely Affected By the System Maintenance Study.

Complainant asserts that other Equipment Mechanics III having "like duties" received a salary increase under the study on their anniversary dates. The DPA offered

the affidavit of Donald Fowler who stated that the system maintenance study did not provide for such a salary increase. Complainant did not present any counter evidence to create a triable issue of fact on this point. She, thus, alternatively contends that other Equipment Mechanics III who had more seniority than she received anniversary increases that they would not have been entitled to receive but for the increase in pay grade pursuant to the system maintenance study. Indeed, her own evidence is consistent with this theory of her claim. An affidavit by Mark Burry, a fellow equipment mechanic, states that "But for the system maintenance study I would not have received nor was entitled to an anniversary increase."

Complainant acknowledges that she too received an anniversary increase. But, she complains that she would have received the increase irrespective of the system maintenance study, whereas other employees would not have received an increase. Thus, they received a benefit under the system maintenance study that she did not. Complainant protests that this outcome is contrary to the law as she was not compensated as those performing substantially similar services. Respondents agree that some equipment mechanics with more seniority than Complainant who were no longer entitled to receive anniversary increases received them because their pay grade changed as a result of the study. Respondents argue, however, that there is no legal significance to this consequence of the study.

Complainant is correct that employees who have reached what is called a "five-year rate" must serve for a total of five years at that rate and are ineligible for anniversary increases. However, DPA actions such as system maintenance studies may impact employees eligibility for anniversary increases.

Personnel Board Rule P-3-17, 4 CCR 801, provides in pertinent part that

> Until July 1, 2002, employees whose performance is satisfactory or above and who work 50% or more are eligible for a 5% increase in base pay on their annual anniversary date. Employees who work less than 50% and whose performance is satisfactory or above are eligible every other year. Exceptions are as follows. Employees must serve a total of five years at the five-year rate. When base pay is between the five-year rate and grade maximum, the employee will receive less than 5%. Employees at grade maximum are ineligible for anniversary increases.

And Personnel Board Rule P-3-16, 4 CCR 801, provides in relevant part that

> Normally service and anniversary dates do not change, including for military leave and military training leave. Exceptions are as follows . . .. For any action that moves an employee at the five-year rate or higher to a five-year rate or less (e.g., upward, downward,

> lateral movement), the anniversary date year must be adjusted. Employees must complete the five-year service requirement. When again reaching the five-year rate, time previously spent at that rate or above will be credited toward five-year requirement. If the employee has the required five years, the employee shall be moved to the grade maximum immediately with the following exception: During a system maintenance study, if the employee is at the maximum and the grade is changed, the year is changed to when the anniversary date will next occur, even if the employee has served the required five years.

Because of the change in pay grade, some employees who were no longer eligible to receive an anniversary increase were entitled to one as a result of the study. Respondents do not dispute this practical effect of the system maintenance study. They counter, however, that this benefit to some more senior employees has no legal significance and that Complainant is not similarly situated to those employees who have more seniority than she.

"The equal protection guarantees of the United States and Colorado constitutions require like treatment of persons who are similarly situated." *Davis v. S. Paolino*, 21 P.3d 870, 872 (Colo. App. 2001). "In the absence of a statutory infringement on a fundamental right or the creation of a suspect class, equal protection is satisfied if the statutory classification has a reasonable basis in fact and bears a reasonable relationship to a legitimate governmental interest." *Id.*; *Dempsey v. Romer*, 825 P.2d 44, 57 (Colo. 1992). The party challenging the statutory classification bears the burden of proving beyond a reasonable doubt that the statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. *Dept. of Corrections Employees Coalition v. Romer*, 879 P.2d 485, 489 (Colo. App. 1994).

The Administrative Law Judge agrees with Respondents. First, Complainant was not similarly situated to those having more seniority than she. Second, the system maintenance study did not bestow differential benefits upon the employees it affected. The study elevated the pay grade of equipment mechanics in a neutral way. However, given various employees' differing seniority, the study affected them differently. This in itself is not a constitutional violation. Equal protection does not require that there be absolute equality among those similarly situated. *Krupp v. Breckenridge Sanitation District*, 1 P.3d 178 (Colo. App. 1999), *aff'd,* 19 P.3d 687 (Colo. 2000). All that is required is a rational basis for the action. *Id.* Thus, the government may take some actions or impose limitations even if those limitations work favorably for some but not for others. *See Davis*, 21 P.3d at 872. Some may have received an anniversary increase that they were no longer eligible to receive. Some may have received a salary increase because prior to the study they were paid less than the minimum of the new pay grade D44. In either case, the system maintenance study did not provide for an across-the-

board salary increase. And, at the end of the day, Complainant received nothing more or less than other employees similarly situated to her.

In short, the Administrative Law Judge finds as a matter of law that the system maintenance study JEL 00-8/JEL 002, implemented on July 1, 2000, did not provide for a salary increase. Complainant failed to raise a disputed issue. To the extent she showed that some employees became eligible for an anniversary increase that they would not have received otherwise had the study not been implemented, she failed to demonstrate that she was treated disparately or that this indirect consequence of the study amounted to an increase in salary that she was denied.

Respondents' motion for summary judgment is therefore granted, and Complainant's appeal is dismissed with prejudice.

Dated this ___ day
of February, 2002, at
Denver, Colorado

Sunhee Juhon
Administrative Law Judge
1120 Lincoln, Suite 1400
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing

Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 □ inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of February, 2002, I placed true copies of the foregoing **ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall
CAPE
1145 Bannock Street
Denver, Colorado 80204

and in the interagency mail, to:

Carol Ceasar
Assistant Attorney General
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